IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1756

UNITED STATES OF AMERICA,
Petitioner,

v.

HELEN MITCHELL, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Claims

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RESPONDENTS' BRIEF IN OPPOSITION

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The respondents, Helen Mitchell, some 1,465 individual Indians owning allotments on the Quinault Reservation, and the Quinault Tribe, respectfully urge that this Court deny the petition for writ of certiorari, seeking review of the Court of Claims' opinion in this case, reported at 591 F.2d 1300. We further respectfully urge, for reasons important to the timing of the resumption of trial, that the petition be denied before the Court adjourns for the Term.

QUESTIONS PRESENTED

1. Whether individual Indians and Indian tribes or groups may sue the United States for money damages under 28 U.S.C. §§ 1491 and 1505 when the United

States breaches its fiduciary duties in managing the Indians' trust land and monies.

2. Whether the legislative history of 28 U.S.C. § 1505 shows that Congress intended that the Court of Claims have jurisdiction over Indian claims for breach of trust.

3. Whether the petition raises any issue not already decided by *United States* v. *Testan*, 424 U.S. 392 (1976).

STATEMENT OF THE CASE

The Government's statement of the case is generally correct, but bears some elaboration. The Government states that:

> The forest resources on the allotted lands have been managed by the Department of the Interior, which has sold the timber from individual allotments and managed the revenue from the sales.[1]

This, however, does not describe the total control of the Interior Department, through its Bureau of Indian Affairs (BIA), over the management and disposition of respondents' lands and timber.[2] Normally, the BIA determines which blocks of timber shall be put up for sale. It then obtains a power-of-attorney from the allottee (or a resolution from the Tribe) after which the BIA handles every detailed aspect of a sale—advertisements for bids, letting of contracts, and supervision of the loggers who build roads, cut the timber, and haul it off. The BIA sees to the counting and grading of logs, collects the money, deducts its fee, and credits the balance to the Tribe's or allottee's BIA account. The Indians (who do not live on their timbered allotments) have little or nothing to do with the entire operation, except (1) signing the initial

[1] Petition for Certiorari (hereinafter "Petition") at 4.

[2] The BIA manages tribal lands as well as allotted lands.

power-of-attorney, and (2) opening the envelope with the check.

The Indian owner is not even allowed to cut and sell timber from his own allotment without the permission of the BIA and without posting a bond to assure compliance with the BIA's harvesting regulations.[3] Thus, the trust responsibilities of the Government here are not passive; the BIA has total control over the management of the Indians' land and timber.[4]

REASONS WHY THE WRIT SHOULD BE DENIED

1. Congress intended that the Court of Claims should have jurisdiction over Indian breach of trust cases.

The legislative history of the Indian Claims Commission Act of 1946, 60 Stat. 1049 (which Act contains what is now 28 U.S.C. § 1505, one of our two bases for jurisdiction) clearly manifests Congress' desire to end the need to petition Congress for special jurisdictional acts for Indian claims against the Government. Congress recognized that unless Indians were given the right to sue the Government for mismanagement of their trust funds and property, there would continue to be

> encourage[ment of] bureaucratic disregard of the rights of Indian citizens by a small minority of governmental officials who are comforted by the

[3] *See* 25 C.F.R. § 141.19 (1978).

[4] We would also note with respect to the facts that this case was filed in 1971 and, at that time, the Government raised no jurisdictional defense in its answer. The jurisdictional issue was not raised until 1977 after the first session of a multi-session trial, after the taking of more than a dozen depositions, after the development of over 20,000 pages of exhibits by respondents, and after extensive investigation and report work by a number of expert witnesses. The now two-year delay in this partially tried case over what we consider to be a grasping-at-straws issue has caused respondents considerable practical problems, not the least of which has been the death of an important expert witness.

> thought that there is no judicial redress available to the victims of their maladministration. . . .[5]

Congressman (now Senator) Henry M. Jackson, a principal sponsor of the bill in the House, stressed the importance of this fact as a reason to provide Indians with access to the courts:

> The Interior Department itself has suggested that it ought not be in a position where its employees can mishandle funds and lands of a national trusteeship without complete accountability . . . .
>
> . . . [L]et us see that the Indians have their fair day in court so that they can call the various Government agencies to account on the obligations that the Federal Government assumed.[6]

The House report summarized the purpose of the Act very succinctly as follows:

> [T]he statutory prohibition against litigation in the Court of Claims growing out of agreements with Indian tribes [12 Stat. 767] would be lifted and the Indian would henceforth have the same right as his white or black neighbor to secure a full and free hearing in the Court of Claims, or any other appropriate tribunal, *on any controversy with the Federal Government that may arise in the future.*[7]

Congress was also aware of the varied nature of Indians' claims, recognizing that: "All sorts of agreements have been made concerning the use and disposition of these [Indian] funds and promising protection of the

[5] H.R. Rep. No. 1466, 79th Cong., 1st Sess., at 5 (1945).

[6] 92 Cong. Rec. 5312 (1946). We wish to advise the Court that the Interior Department has recently reaffirmed its 1946 position and, pursuant thereto, urged the Justice Department not to seek reversal of the Court of Claims' decision in this case.

[7] H.R. Rep. No. 1466, 79th Cong., 1st Sess., at 3 (1945) (emphasis added).

lands retained by the Indians."[8] Indeed, in describing the nature of Indian claims, Congress specifically referred to a timber mismanagement claim of the Menominee Indians (much like our own here) for which a special jurisdictional act had been enacted, and which had been found by the Court to be a valid claim.[9] Congress observed:

> If we fail to meet these obligations by denying access to the courts *when trust funds have been improperly dissipated or other fiduciary duties have been violated,* we compromise the national honor of the United States.[10]

Thus, Congress in passing the Indian Claims Commission Act of 1946 clearly intended to give Indians the right to sue the United States in the Court of Claims to the same extent as other citizens, and it specifically intended that suits involving mismanagement of trust property were to be within the ambit of the federal courts' jurisdiction. Indeed, if such cases were not within the courts' jurisdiction, it is hard to see what post-1946 claims could be brought today, since all of the old treaty claims have been or will soon be resolved, and the principal activity of the Government since 1946 capable of generating Indian claims has been the performance of its role as manager of Indian trust property.

The failure of the Government to discuss or even mention the Indian Claims Commission Act in its petition for certiorari speaks volumes about the strength of the Government's case for certiorari. Obviously, if Congress intended in 1946 that Indians have the right to sue in the Court of Claims for mismanagement of their trust lands and monies, the only prerequisite to the court's jurisdiction over such a case is the finding of a trust

[8] *Id.* at 4.

[9] *Id.*

[10] *Id.* at 5 (emphasis added).

relationship. This is the essence of the Court of Claims' decision,[11] and it found the trust relationship here in the General Allotment Act of 1887, 24 Stat. 389, 25 U.S.C. § 348. In an identical situation in *Mason* v. *United States*, 198 Ct. Cl. 599, 461 F.2d 1364 (1972), the Court of Claims found jurisdiction under 28 U.S.C. § 1491 based upon the trust relationship found in the Osage Allotment Act, 34 Stat. 539.[12] The legislative history of the General Allotment Act, of which the Government makes so much in its petition for certiorari, is, of course, totally irrelevant in the face of the legislative history of the Indian Claims Commission Act.[13] Thus, there can be no doubt about the correctness of the Court of Claims' handling of the Government's unpersuasive arguments regarding a lack of jurisdiction in this case:

> If we accepted defendant's current argument, these objectives [of Congress in the Indian Claims Commission Act], so plainly expressed when the predecessor of section 1505 was adopted in 1946, could not be fulfilled, or even advanced. Congress would still have to do that which it did not want or expect to do in 1946—continue to pass special jurisdictional acts or from time to time to have to enlarge this court's general jurisdiction over Indian money claims. *We are justified, therefore, in concluding that Congress, when it passed section 1505, considered that Indian trust legislation, such as the General Allotment Act, supplies a proper foundation for Indian monetary suits in this court to recover compensation for proven breaches of those trusts.*[14]

[11] Petition at 9a-11a.

[12] 198 Ct. Cl. at 617, 461 F.2d at 1374.

[13] *Naganab* v. *Hitchcock*, 202 U.S. 473 (1906), upon which the Government relies (Petition at 9 n.4), is also irrelevant since it was decided long before the Indian Claims Commission Act was passed. As the case did not even involve the General Allotment Act, the Government's use of it is doubly incorrect.

[14] Petition at 11a-12a (emphasis added).

We would further note that the Indian reservation here involved—the Quinault—is the same as that in *Squire* v. *Capoeman*, 351 U.S. 1 (1956). There the Court, in holding that the General Allotment Act exempted the timber sale proceeds from federal taxation, considered it important that the timbered land was of little value after the timber was cut. Thus, the Court reasoned that Congress intended that the proceeds of the sale should be preserved for the Indian undiminished by taxation.[15] How ironic it would be if the Government as tax collector could not diminish the value of the land, but as trustee could freely do so by gross mismanagement. It would be doubly ironic that a tax exemption was found in *Capoeman* by implication, contrary to the usual rule that "exemptions to tax laws should be clearly expressed," [16] while in the instant case jurisdiction would be denied because of failure to satisfy the usual rule that consent to sue the United States should be clearly expressed. Although 28 U.S.C. § 1505 does not expressly grant jurisdiction to sue for breach of trust, the legislative history makes it clear that this was precisely Congress' intent.

2. Jurisdiction in Indian cases like this one has been recognized by the Court of Claims and this Court for over a decade.

Contrary to the Government's assertion that the decision of the Court of Claims in this case is unprecedented,[17] jurisdiction over breaches of fiduciary duties by the United States has been upheld by the Court of Claims in a long line of Indian cases, one of which (*Mason*, see below) went on to be affirmed as to jurisdiction by this Court. These cases were brought by Indians un-

[15] 351 U.S. at 10.

[16] *Id.* at 6.

[17] Petition at 12-13.

der 28 U.S.C. § 1491 and 28 U.S.C. § 1505, the two provisions relied upon by the Indians here.

The first such case was *Klamath & Modoc Tribes* v. *United States*, 174 Ct. Cl. 483 (1966), a claim brought under 28 U.S.C. §§ 1491 and 1505 by the Klamath Tribe and individual Indians for additional compensation for lands disposed of by the United States and for a general accounting. The Court of Claims held that it had no jurisdiction to order a general accounting, but stressed that it did have jurisdiction over the claims for monetary relief based upon the mismanagement of Indian trust funds and property by the United States (claims very similar, incidentally, to ours here):

> We emphasize that our action today [refusing to order a general accounting] does not leave the Klamath Tribe and the individual Indians without a forum for the recovery of any damages to which they are entitled because of the Government's mishandling of tribal funds and property. No special jurisdictional act is required to provide that relief.[18]

Subsequent Indian claims against the Government where jurisdiction was tacitly or expressly upheld include:

(2) *Navajo Tribe* v. *United States*, 176 Ct. Cl. 502, 364 F.2d 320 (1966), involving a tribal claim for inadequate compensation under three oil and gas leases;

(3) *Fields* v. *United States*, 191 Ct. Cl. 191, 423 F.2d 380 (1970), involving a claim by individual Indians for oil and gas rents and royalties;

[18] 174 Ct. Cl. at 491. No special jurisdictional act was required because the Court of Claims analyzed the legislative history of the Indian Claims Commission Act and concluded that Congress had clearly intended for Indians to be able to sue for damages if the United States mismanaged trust funds or property. *Id.* at 489-91.

(4) *Hebah* v. *United States*, 192 Ct. Cl. 785, 428 F.2d 1334 (1970), involving a claim by an individual Indian for damages pursuant to a treaty clause;

(5) *Mason* v. *United States*, 198 Ct. Cl. 599, 461 F.2d 1364 (1972), jurisdiction under 28 U.S.C. § 1491 cited and tacitly upheld but merits reversed, 412 U.S. 391 (1973) (discussed further below), involving a claim by an individual Indian heir for the wrongful use of trust funds to pay state inheritance taxes;

(6) *Manchester Band of Pomo Indians, Inc.* v. *United States*, 363 F. Supp. 1238 (N.D. Cal. 1973), a federal district court case involving a tribal claim, similar to ours, for mismanagement of trust funds by the United States brought under 28 U.S.C. § 1346(a)(2), the district court counterpart of the Tucker Act, 28 U.S.C. § 1491;

(7) *Cheyenne-Arapaho Tribe* v. *United States*, 206 Ct. Cl. 340, 512 F.2d 1390 (1975), involving tribal claims, similar to ours, for the mismanagement of Indian trust funds by the United States; and

(8) *Coast Indian Community* v. *United States*, 213 Ct. Cl. 129, 550 F.2d 639 (1977), a decision involving a claim by an unincorporated association of Indians against the United States for selling a right-of-way across the plaintiff's land for an inadequate price (some of our claims are very similar).[19]

In addition, the Court of Claims has already issued three decisions in earlier test cases involving the very Indians in this case and in none of those decisions was jurisdiction ever questioned by the Government or by the court. The first was *Capoeman* v. *United States*, 194

[19] Although the Government attempts to raise the specter of huge damage awards to Indians for breaches of trust duties (Petition at 13), it is clear that this will not universally be the case by any means. The *Coast Indian* case, for example, awarded only $47,500.

Ct. Cl. 664, 440 F.2d 1002 (1971), involving the application of the statute of limitations to a claim against the United States for wrongfully deducting an administrative fee for managing an Indian's timber. Although the court decided against the Indian on the limitations issue, it relied upon 28 U.S.C. § 1491 as an adequate jurisdictional basis for the claim. In the repeat of that case on the merits, the Indians again lost, but the court again acknowledged jurisdiction under 28 U.S.C. § 1491. *Quinault Allottees Ass'n* v. *United States*, 202 Ct. Cl. 625, 485 F.2d 1391 (1973), *cert. denied*, 416 U.S. 961 (1974). Finally, in a procedural decision in this case, the Court of Claims ruled that this case was an "opt-in," as opposed to an "opt-out," class action,[20] again without questioning jurisdiction. *Quinault Allottees Ass'n* v. *United States*, 197 Ct. Cl. 134, 453 F.2d 1272 (1972).

One of the cases referred to above—the *Mason* case—was reviewed by this Court. Contrary to the Government's assertion,[21] the jurisdictional issue was contested and briefed by both sides in the Court of Claims. That court cited a long string of cases, including *Eastport Steamship Corp.* v. *United States*, 178 Ct. Cl. 599, 605-06, 372 F.2d 1002, 1007-08 (1967), and stated:

> A suit against the United States on behalf of the estate of a non-competent Indian, for damages compensating the estate for breach by the Government of its trust obligation under a federal statute, is within 28 U.S.C. § 1491 as a claim founded upon an Act of Congress for damages "in cases not sounding in tort." The Osage Allotment Act [which is basically the same as the General Allotment Act] implies that if the Government breaches its trust duty to the pecuniary disadvantage of a non-competent Osage allottee, due compensation will be paid by the United States.[22]

[20] Due to this decision, which for most practical purposes denied class action benefits, the original 500 Indians were forced to expend great amounts of time and money contacting their scattered brethren and informing them about the case. To date, approximately 1,465 individual Indians and the Quinault Tribe have signed up as plaintiffs in the case.

[21] Petition at 12 n.7.

Apparently, for whatever reason, the Government decided to abandon the jurisdictional issue in the Supreme Court. This Court did, however, note without raising any question that jurisdiction was based on 28 U.S.C. § 1491,[23] although it reversed the lower court's decision on the merits.

In summary, the long line of cases dealing with the jurisdictional issue raised by the Government here clearly demonstrates that the issue is neither novel nor unsettled. Every time the Court of Claims has considered the issue since 1946 it has been compelled to reach the same result. Its decision here is therefore hardly "unprecedented" as the Government urges, but rather has been considered well-settled.

3. The issue raised by the Government has already been decided by this Court.

In addition to the reference in the *Mason* case above, this Court has considered the general issue of the Court of Claims' jurisdiction under 28 U.S.C. § 1491, and laid down the governing principle. The issue was first addressed at length by the Court of Claims itself in *Eastport Steamship Corp.* v. *United States*, 178 Ct. Cl. 599, 372 F.2d 1002 (1967), where it stated:

> [I]t is not every claim involving or invoking the Constitution, a federal statute, or a regulation which is cognizable here. The claim must, of course, be for money. Within that sphere, the non-contractual

[22] 198 Ct. Cl. at 617, 461 F.2d at 1374.

[23] 412 U.S. at 394 n.5.

> claims we consider under Section 1491 can be divided into two somewhat overlapping classes—[1] those in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum; and [2] those demands in which money has not been paid but the plaintiff asserts that he is nevertheless entitled to a payment from the treasury. In the first group (where money or property has been paid or taken), the claim must assert that the value sued for was improperly paid, exacted or taken from the claimant in contravention of the Constitution, a statute, or a regulation. *In the second group, where no such payment has been made, the allegation must be that the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum.*
>
> * * * *
>
> *. . . Under Section 1491 what one must always ask is whether the constitutional clause or the legislation which the claimant cites can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.*[24]

In *United States* v. *Testan*, 424 U.S. 392 (1976), this Court dealt with the same issue and approved the Court of Claims' ruling in *Eastport*. This Court stated:

> [T]he asserted entitlement to money damages depends upon whether any federal statute "can fairly be interpreted as mandating compensation by the Federal Government for damage sustained." *Eastport S.S. Corp.* v. *United States*. . . .[25]

Thus, the general principle has been established by this Court—namely, that the statute for whose violation the plaintiff seeks damages must "fairly be interpreted as mandating compensation." This, in itself, is language of

[24] 178 Ct. Cl. at 605-07, 372 F.2d at 1007-09 (footnotes omitted; emphasis added).

[25] 424 U.S. at 400.

implication, and the Government is simply incorrect when it argues that jurisdiction cannot be inferred.[26] Such an argument flies in the face of the *Testan* and *Eastport* decisions.

This case merely involves the application of a rule already laid down by this Court to a specific situation. It seems hardly necessary or useful for the Court to re-

[26] Petition at 8. This Court has also upheld implied rights of action in other cases based upon statutes (*see, e.g., Cannon* v. *Univ. of Chicago*, 47 L.W. 4549, 4557 (1979); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969)), and the Constitution (*see, e.g., Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971)).

We note that the Government concedes that the Court of Claims has jurisdiction where the claim is for money "improperly exacted or retained," but argues that "none of respondents' claims, with the possible exception of the claim based on excessive administration or road fees . . . are for money improperly exacted or retained." (Petition at 8 n.3.) The implication is that only a small portion of our claims fall within what the Government considers to be the undisputed jurisdiction of the Court of Claims (the first category referred to in the *Eastport* case quoted above).

The fact is that a substantial part of our claims (although it is impossible to quantify it at this time) is for monies improperly exacted or retained. The claim for administrative fees referred to by the Government involves the Indians' involuntary payment to the Government of a management fee far in excess of the value of the services rendered. In addition, the Government maintained a large fund consisting of advance payments from the loggers who bought the Indians' timber. This was invested by the Government and earned interest which the Government did not credit to the Indian timber owners, but kept and used for its own purposes. The Indians claim that they are the owners of this interest and that, therefore, it was money "improperly exacted or retained." Furthermore, the Government, in the course of determining the price which the loggers were required to pay, used a formula that deducted logging costs from the log value of the timber. The Indians claim that many of the Government's cost figures were excessive or wholly improper and, to that extent, represented Indian money "improperly exacted or retained," even though the benefit of the excessive charges was received by the loggers, not the Government. As far as the Indians were concerned, monies were improperly exacted from them by the Government. Among these charges improperly exacted were the road charges mentioned by the Government.

view the Court of Claims' application of the rule here, especially in light of the clear legislative history of the Indian Claims Commission Act manifesting Congress' intent that the Court of Claims have jurisdiction over Indian breach of trust cases.

4. The Court of Claims has jurisdiction over this case under the "implied contract" and "liquidated or unliquidated damages in cases not sounding in tort" clauses of 28 U.S.C. § 1491.

Even if the Court of Claims did not have jurisdiction over this case based upon an "Act of Congress" or "any regulation of an executive department," it would still have Tucker Act jurisdiction under the "implied contract" and "liquidated or unliquidated damages in cases not sounding in tort" clauses of 28 U.S.C. § 1491. Therefore, even were this Court to hold that this case does not come within the "Act of Congress" clause, the case could still logically come within the "implied contract" or "damages" clauses.

a. *Implied Contract*

Claims for damages for breach of an implied contract may be brought under the Tucker Act for contracts implied in fact, not for contracts implied in law. *Tatem Mfg. Co.* v. *United States*, 181 Ct. Cl. 496, 386 F.2d 898 (1967). For an implied in fact contract to exist, there must have been a meeting of the minds or tacit understanding, which can be inferred from the conduct of the parties in light of the surrounding circumstances, and there must have been some consideration flowing to the United States. *Somali Development Bank* v. *United States*, 205 Ct. Cl. 741, 750, 508 F.2d 817, 822 (1974); *Porter* v. *United States*, 204 Ct. Cl. 355, 365, 496 F.2d 583, 590 (1974), *cert. denied*, 420 U.S. 1004 (1975).

The Government's assertion that none of plaintiffs' claims are founded upon an "express or implied contract with the United States"[27] is flatly incorrect. In this case the Government has, pursuant to 25 U.S.C. § 413, collected an involuntary fee from the Indians for managing their timberlands. By the Government's own regulations, these fees are intended to pay for virtually all costs associated with managing and protecting the forest lands and selling the timber. *See* 25 C.F.R. § 141.18 (1978). Clearly, the Government's collection of fees for managing and protecting the Indians' timberlands creates an implied contract which should entitle the Indians to recover in damages when the services they have paid for have been inadequate.[28] Surely there is a tacit understanding that the Indians will get the services for which they are paying and for which the Government, by its own statutes and regulations, has agreed to provide.

Moreover, the trust relationship established by the Treaty of Olympia and the General Allotment Act is itself a form of contract between the Indians and the United States whereby the United States undertook to protect the Indians and manage their property in exchange for the Indians ceding their land to the United States and ultimately accepting allotments.[29] At least one recent President has so recognized.[30] The courts, and

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[27] Petition at 8 n.3.

[28] If given the opportunity, respondents will show at trial that the fees collected by the Government have grossly exceeded its own stated expenses.

[29] *Cf. Choate* v. *Trapp*, 224 U.S. 665 (1912) (Indians acquired contractual rights to tax exemption when they gave up their interests in tribal property and accepted individual land patents).

[30] In a widely noted message to Congress in July, 1970 (116 Cong. Rec. 23250), President Richard Nixon said that he believed that it was wrong to "terminate" Indians, *i.e.*, to unilaterally cancel the trust relationship with them for a number of reasons:

> First, the premises on which it [termination] rests are wrong. Termination implies that the Federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it

even Congress, may no more abrogate this duty by withholding any redress for breach of the trust duty than they may abrogate other property rights of Indians.[31]

b. *Liquidated or Unliquidated Damages in Cases Not Sounding in Tort*

In addition, these claims fall under the category of "liquidated or unliquidated damages in cases not sounding in tort." Although this "catch-all clause" has been little used in the past, it has been applied by the Court of Claims to an Indian breach of trust claim in the *Mason* case discussed earlier. The court concluded that a claim by an Indian that the Government had breached its trust obligations by using trust funds to pay a state tax came within the provisions of 28 U.S.C. § 1491 as either founded upon an Act of Congress or for damages "in cases not sounding in tort." [32] Although this Court reversed this decision on the merits, it affirmed without comment the Court of Claims' finding of jurisdiction under Section 1491.[33] Presumably, therefore, this Court agreed with the lower court's reasoning on this point.

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can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States Government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations.

[31] In *Choate* v. *Trapp*, the property right was a tax exemption, and this Court said it was "not subject to impairment by legislative action." 224 U.S. at 677. *See also Jones* v. *Meehan*, 175 U.S. 1, 32 (1899).

[32] 198 Ct. Cl. at 617; 461 F.2d at 1374.

[33] 412 U.S. at 394 n.5.

We submit that if the "cases not sounding in tort" clause has any meaning at all, and we believe it does, it covers cases such as this one where the Government has breached its fiduciary duties to its Indian wards.

CONCLUSION

For the foregoing reasons, respondents urge that the petition for a writ of certiorari be denied. We further respectfully urge, for reasons important to the timing of the resumption of trial, that it be denied before the Court adjourns for the Term.

Respectfully submitted,

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